

REMARKS

The present Amendment is in response to the Office Action mailed July 28, 2005 in the above-identified application. Enclosed herewith is a Petition requesting a three-month extension of time for resetting the deadline for responding to the Office Action from October 28, 2005, to and including January 28, 2006.

Applicants appreciate the Examiner's willingness to conduct a telephone interview of the above-identified application on January 26, 2006, as well as the Examiner's withdrawal of the finality of the rejection mailed on July 28, 2005. As discussed during the above-noted telephone interview, and as indicated in the Interview Summary issued January 26, 2006, the Examiner has withdrawn the finality of the Office Action mailed July 28, 2005. As a result, the Office Action mailed July 28, 2005 will be treated as a non-final Office Action and the Applicants will respond to the applied art of record in the present Amendment.

In the present Amendment, Applicants have amended claims 13, 15-16, 18, 20-21 and 23-24. In addition, claims 17, 19 and 22 have been canceled. Support for the amendment of the above-noted claims is found in the originally filed specification. Thus, the amendments to the claims add no new matter and are fully supported by the original specification.

In the Office Action, the Examiner objected to the specification as failing to provide proper antecedent basis for the claimed subject matter. Specifically, the Examiner objected to the use of the terminology "non-congruent" in claims 13 and 21. As indicated above, the terminology "non-congruent" has been removed from both claims 13 and 21. Thus, the Examiner's objection to the specification under 37 CFR 1.75(d)(1) has been rendered moot.

The Examiner provisionally rejected claims 13-15, 21 and 24-26 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3 and 8-10 of co-pending Application No. 10/140,153. The Examiner also rejected claims 13-15, 21 and 24-26 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. 6,863,689. In response, Applicants enclose herewith a Terminal Disclaimer to overcome Application No. 10/140,153 and U.S. Patent No. 6,863,689.

The Examiner rejected claim 24 under 35 U.S.C. § 112, second paragraph as being indefinite. Specifically, the Examiner asserted that the limitations "said mesh" in claim 24 lacks antecedent basis. In response, claim 24 has been amended to change "said mesh" to --said deflectable porous surface--. In view of the above-noted amendment, claim 24 is now deemed to satisfy the requirements of 35 U.S.C. § 112, second paragraph, and is otherwise allowable.

The Examiner rejected claims 13-16, 18, 21 and 24-26 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,370,697 to Baumgartner. In response, Applicants respectfully assert that independent claim 13 is unanticipated by Baumgartner because the cited reference does not teach or suggest an intervertebral spacer device including a device "wherein an inner surface of one of said plates comprises a ball-shaped structure extending therefrom and an inner surface of the other one of said plates has a spring secured thereto, said spring having a curvate volume for receiving and holding therein said ball-shaped structure." For the above reasons, claim 13 is unanticipated by Baumgartner and is otherwise allowable. Claims 14-15 and 18 are unanticipated, *inter alia*, by virtue of their dependence from claim 13, which is unanticipated for the reasons set forth above.

Independent claim 16 is unanticipated by Baumgartner because the cited reference neither discloses nor suggests an intervertebral spacer device "comprising a joint that couples said first and second plates together, said joint including a ball attached with one of said plates and a socket attached with the other of said plates."

Independent claim 21 is unanticipated by Baumgartner because the cited reference neither discloses nor suggests an intervertebral spacer device whereby "an inner surface of one of said plates has a ball-shaped structure extending therefrom and an inner surface of the other one of said plates has a spring secured thereto, said spring having an opening for receiving and holding therein said ball-shaped structure." Claims 24-26 are unanticipated, *inter alia*, by virtue of their dependence from claim 21, which is unanticipated for the reasons set forth above.

The Examiner rejected claims 13-16, 18, 21 and 24-26 under 35 U.S.C. § 102(b) as being anticipated by or, in the alternative, under 25 U.S.C. § 103(a) as being obvious over U.S. Patent No. 3,867,728 to Stubstad et al. In response, Applicants assert that independent claim 13 is unanticipated by or, unobvious over Stubstad because the cited reference neither discloses nor suggest an intervertebral spacer device whereby "an inner surface of one of said plates comprises a ball-shaped structure extending therefrom and an inner surface of the other one of said plates has a spring secured thereto, said spring having a curvate volume for receiving and holding therein said ball-shaped structure." Claims 14-15 and 18 are patentable over Stubstad, *inter alia*, by virtue of their dependence from claim 13.

Independent claim 16 is unanticipated by or unobvious over Stubstad because the cited reference neither discloses nor suggests an intervertebral spacer device including "a joint that

couples said first and second plates together, said joint including a ball attached with one of said plates and a socket attached with the other one of said plates."

Independent claim 21 is unanticipated by and unobvious over Stubstad because the cited reference neither discloses nor suggests an intervertebral spacer device whereby "an inner surface of one of said plates has a ball-shaped structure extending therefrom and an inner surface of the other one of said plates has a spring secured thereto, said spring having an opening for receiving and holding therein said ball-shaped structure." Claims 24-26 are patentable over Stubstad, *inter alia*, by virtue of their dependence from claim 21, which is patentable for the reasons set forth above.

The Examiner rejected claims 13-26 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,989,291 to Ralph et al. in view of Stubstad. In response, Applicants respectfully assert that independent claim 13 is unobvious over Ralph and Stubstad because the cited references neither disclose nor suggest an intervertebral spacer device whereby "an inner surface of one of said plates comprises a ball-shaped structure extending therefrom and an inner surface of the other one of said plates has a spring secured thereto." Clearly, Ralph does not disclose that the spring 230 (FIG. 9) is "secured" to plate 100a. For these reasons, claim 13 is unobvious over Ralph and Stubstad and is otherwise allowable. Claims 14-15, 18 and 20 are unobvious, *inter alia*, by virtue of their dependence from claim 13, which is unobvious for the reasons set forth above.

Independent claim 16 is unobvious over Ralph and Stubstad because the cited references neither disclose nor suggest an intervertebral spacer device having "a joint that couples said first and second plates together, said joint including a ball attached with one of said plates and a socket attached with the other one of said plates."

Independent claim 21 is unobvious over Ralph and Stubstad because the cited references neither disclose nor suggest an intervertebral spacer device including a structure whereby "an inner surface of one of said plates has a ball-shaped structure extending therefrom and an inner surface of the other one of said plates has a spring secured thereto, said spring having an opening for receiving and holding therein said ball-shaped structure." Claims 23-26 are unobvious, *inter alia*, by virtue of their dependence from claim 21, which is unobvious for the reasons set forth above.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

Application No.: 10/648,464

Docket No.: SPINE 3.0-446 CIP III CONT

If there are any additional charges in connection with this requested Amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: January 27, 2006

Respectfully submitted,

By 

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